CASE NO. 16-2297 [Consolidated with 16-3162 and 16-3271]

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Petitioner, No. 16-2297 v. NATIONAL LABOR RELATIONS BOARD, Respondent, and HOBBY LOBBY STORES, INC., Intervening Respondent.	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745
HOBBY LOBBY STORES, INC., Petitioner, No. 16-3162 v. COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Intervening Respondent, and NATIONAL LABOR RELATIONS BOARD, Respondent.	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745

NATIONAL LABOR RELATIONS BOARD, Petitioner, No. 16-3271 v. HOBBY LOBBY STORES, INC., Respondent, and COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE, Intervening Petitioner,	Petition for Review of an Order of the National Labor Relations Board No. 20-CA-139745

APPEAL OF DECISIONS OF NATIONAL LABOR RELATIONS BOARD
363 NLRB No. 195, 20-CA-139745

PETITIONER, INTEVENING RESPONDENT AND INTERVENING PETITIONER COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE

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Request is hereby made that this Court grant judicial notice of the attached Complaint, attached hereto as Exhibit A, and the Counsel for the General Counsel's Brief to the Administrative Law Judge, attached hereto as Exhibit B. Federal Rule of Evidence 201.

Dated: December 29 ,2016

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

Attorneys for COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

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EXHIBIT A

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

HOBBY LOBBY STORES, INC.

And

Cases 20-CA-154286
20-CA-160237

THE COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT AND NOTICE OF HEARING

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 20-CA-154286 and Case 20-CA-160237, which are based on charges filed by The Committee to Preserve the Religious Right to Organize (Charging Party) against Hobby Lobby Stores, Inc. (Respondent), are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below.

1. (a) The charge in Case 20-CA-154286 was filed by the Charging Party on June 15, 2015, and a copy was served on Respondent by U.S. mail on June 16, 2015.

(b) The charge in Case 20-CA-160237 was filed by the Charging Party on September 17, 2015, and a copy was served on Respondent by U.S. mail on September 18, 2015.

2. (a) At all material times, Respondent, an Oklahoma corporation with places of business nationwide and throughout the State of California, including one in Sacramento, California, has been engaged in business as a retailer specializing in arts, crafts, hobbies, home decor, holiday, and seasonal products.

(b) During the calendar year ending December 31, 2014, Respondent, in conducting its business operations described above in subparagraph 2(a), derived gross revenues in excess of $500,000.

(c) During the time period described above in subparagraph 2(b), Respondent sold and shipped from its California facilities products valued in excess of $5,000 directly to points outside the State of California.

3. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4. (a) Since at least December 15, 2014, through sometime in July 2015, Respondent maintained rules against the following conduct under certain policies within its employee handbook:

> (1) EMPLOYEE CONDUCT POLICY
> . . .
> 8. Using language that is considered threatening, intimidating, coercive, abusive, profane, or inappropriate.
>
> 9. Verbal or physical conduct in violation of the Company's Policy Against Inappropriate Conduct.
> . . .
> 13. Use of personal cellular phones (except in an emergency or with permission of the employee's supervisor), recording equipment, or other personal electronic devices (e.g., iPod, MP3 player, etc.) while on duty.

14. Interfering with work performance of fellow employees, or creating an atmosphere that hinders or interferes with Company operations.

. . .

16. Use of the Company's material, time or equipment for unauthorized purposes.

. . .

18. Engaging in such other conduct as may be inconsistent with any of the Company's policies, procedures, practices, or rules.

19. Engaging in other conduct that is inconsistent with any of the Company's policies, procedures, practices, or rules.

(2) POLICY AGAINST INAPPROPRIATE CONDUCT

"Inappropriate Conduct" means comments or actions that are inappropriate for the workplace, disrupt and/or interfere with work performance, or negatively or stereotypically relate to an employee's race, color, religion, gender, pregnancy, national origin, age, disability, Veteran's status, or other characteristics protected by law.

(3) REPORTING INAPPROPRIATE CONDUCT

If an employee feels that he/she has been subjected to Inappropriate Conduct in violation of the Company's Policy Against Inappropriate Conduct, he/she must immediately report the conduct to his/her supervisor

. . .

(4) CONFIDENTIALITY POLICY

The following is intended as a guide to the types of confidential information and material:

- Confidential data about employees, including employee pay rates and performance evaluations; and
- Any information that if disclosed, could adversely affect the Company's business.

(5) BULLETIN BOARDS POLICY

Any posting that contains information that is inappropriate, disruptive, or in violation of Company policy will be removed.

(6) SOLICITATIONS AND DISTRIBUTIONS OF LITERATURE POLICY

In the interest of maintaining a proper business environment and preventing interference with work and any inconvenience to others, employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during work time. During work time, items of this nature shall not be in the immediate physical possession or control of the employee, and

must either be kept in the employee's personal locker or outside of the physical work place, (i.e., an employee's automobile).

(7) LOITERING POLICY
In the interest of maintaining a safe and efficient working environment, employees may not enter company property more than 30 minutes before they are scheduled to clock in and/or report to work. Further, employees may not remain on Company property more than 30 minutes after clocking out and/or completing their workday.

(8) APPEARANCE AND DRESS CODES POLICY
When an employee's appearance causes disruption in the workplace and/or the creation of an uncomfortable working environment for others, corrective, disciplinary action will result. Failure to comply with the standards in this Policy will result in disciplinary action, up to and including termination of employment.

(9) ALL RETAIL STORE LOCATIONS DRESS CODE
Though not all inclusive, the following list is not appropriate attire for the stores:

. . .

6. Foul, offensive, or controversial logos, language, or emblems on clothing and/or accessories.

(10) COMPUTER USAGE
The following Policy relates to the responsible use of computers and computer service and electronic media resource at the Company:

. . .

2. Fraudulent, harassing, threatening, discriminatory, inappropriate, sexually explicit or obscene messages and/or materials are not to be transmitted, printed, requested or stored. Chain letters, solicitations and other forms of mass emails are not permitted. Email may not be used to solicit donations or support on behalf of individuals or organizations.

(11) EMAIL USAGE
Employees are permitted to use the Company's email system only as provided below. If there is evidence that an employee is not adhering to the proper use of email, the Company reserves the right to take disciplinary action, up to and including termination of employment. Employees are prohibited from:

1. Sending or forwarding emails containing defamatory, offensive, discriminatory, inappropriate, or obscene remarks. If an employee receives

an email of this nature, the employee must promptly notify his/her supervisor.

. . .

3. Sending unsolicited email messages, jokes, anecdotes, chain mail, non-work related photos or mass email.

(12) CELL PHONE OR SMART PHONE USAGE
All Company issued cell phones are subject to the same provisions within this Policy for computer, email, telephone, internet, and voicemail usage.

(13) VOICEMAIL USAGE
Any activity that could damage the Company's reputation or potentially put employees and the Company at risk for legal proceedings by any party is prohibited.

5. (a) Sometime in July 2015, Respondent revised the employee handbook described above in paragraph 4 and included the following rules:

(1) EMPLOYEE CONDUCT POLICY

. . .

8. Using language that is considered threatening, intimidating, coercive, abusive, profane, or inappropriate.

9. Verbal or physical conduct in violation of the Company's Policy Against Inappropriate Conduct.

. . .

14. Interfering with work performance of fellow employees, or creating an atmosphere that hinders or interferes with Company operations.

. . .

16. Use of the Company's material, time or equipment for unauthorized purposes.

. . .

18. Engaging in such other conduct as may be inconsistent with any of the Company's policies, procedures, practices, or rules.

19. Engaging in other conduct that is inconsistent with any of the Company's policies, procedures, practices, or rules.

(2) POLICY AGAINST INAPPROPRIATE CONDUCT
"Inappropriate Conduct" means comments or actions that are inappropriate for the workplace, disrupt and/or interfere with work performance, or negatively or stereotypically relate to an employee's race,

color, religion, gender, pregnancy, national origin, age, disability, Veteran's status, or other characteristics protected by law.

(3) REPORTING INAPPROPRIATE CONDUCT

If an employee feels that he/she has been subjected to Inappropriate Conduct in violation of the Company's Policy Against Inappropriate Conduct, he/she must immediately report the conduct to his/her supervisor . . .

(4) CONFIDENTIALITY POLICY

- Any information that if disclosed, could adversely affect the Company's business.

(5) BULLETIN BOARDS POLICY

Any posting that contains information that is inappropriate, disruptive, or in violation of Company policy will be removed.

(6) SOLICITATIONS AND DISTRIBUTIONS OF LITERATURE POLICY

In the interest of maintaining a proper business environment and preventing interference with work and any inconvenience to others, employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during work time. During work time, items of this nature shall not be in the immediate physical possession or control of the employee, and must either be kept in the employee's personal locker or outside of the physical work place, (i.e., an employee's automobile).

(7) LOITERING POLICY

In the interest of maintaining a safe and efficient working environment, employees may not enter company property more than 30 minutes before they are scheduled to clock in and/or report to work. Further, employees may not remain on Company property more than 30 minutes after clocking out and/or completing their workday.

(8) APPEARANCE AND DRESS CODES POLICY

When an employee's appearance causes disruption in the workplace and/or the creation of an uncomfortable working environment for others, corrective, disciplinary action will result. Failure to comply with the standards in this Policy will result in disciplinary action, up to and including termination of employment.

(9) ALL RETAIL STORE LOCATIONS DRESS CODE

Though not all inclusive, the following list is not appropriate attire for the stores:

. . .

6. Foul, offensive, or controversial logos, language, or emblems on clothing and/or accessories.

(b) At all times since July 2015 and continuing to date, Respondent maintained the following policy within its revised employee handbook:

> TECHNOLOGY USE POLICY
> . . .
> Employees Are Prohibited From:
> . . .
> 5. Creating, transmitting, printing, or storing any information containing defamatory, unlawful, offensive, harassing, threatening, discriminatory, inappropriate, or obscene content, or that otherwise violates Company policy (if an employee receives information of this nature, the employee must promptly notify management);
> . . .
> 10. Using Technology in an unauthorized way or that otherwise causes damage or loss to the Company.

6. By the conduct described above in paragraphs 4 and 5, Respondent has been interfering with, restraining, and coercing employees in the exercise of their rights as guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

7. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

As part of the remedy for the unfair labor practices alleged above in paragraphs 4 and 5, the General Counsel seeks an Order requiring Respondent to post at its places of business nationwide any Notice to Employees that may issue in this proceeding.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the Consolidated Complaint. The answer must be **received by this office on or before November 12, 2015, or postmarked on or before**

November 11, 2015. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlrb.gov, click on **E-File Documents,** enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission.

If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the Consolidated Complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT at 9:00 a.m. on February 9, 2016 at the E.V.S. Robbins Courtroom (Third Floor), 901 Market Street, Suite 306, San Francisco, California, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in the Consolidated Complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: October 29, 2015

JOSEPH F. FRANKL
REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 20
901 Market Street, Suite 400
San Francisco, CA 94103-1738

Attachments

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative**. If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlrb.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlrb.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.

- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence**: At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.

- **Exhibits: Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in evidence.** If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts**: An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.

- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.

- **Date for Filing Post-Hearing Brief**: Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.

- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.

- **Exceptions to the ALJ's Decision**: The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE

Cases 20-CA-154286 and 20-CA-160237

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements ***will not be granted*** unless good and sufficient grounds are shown ***and*** the following requirements are met:

(1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).

(2) Grounds must be set forth in ***detail***;

(3) Alternative dates for any rescheduled hearing must be given;

(4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and

(5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

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EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

HOBBY LOBBY STORES, INC.

and

THE COMMITTEE TO
PRESERVE THE RELIGIOUS
RIGHT TO ORGANIZE

Cases 20-CA-154286
20-CA-160237

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

Submitted By
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TABLE OF AUTHORITIES

Cases

I. INTRODUCTION

Hobby Lobby Stores, Inc. ("Respondent") maintains separate employee handbooks for its California store employees and for its employees employed elsewhere in the United States. Jt. Exhs. H-K; Stip. F. 4(d)-(g).[1] As demonstrated below, both versions of Respondent's handbooks in effect through mid-2015 contained numerous rules and policies unlawful on their face under Section 8(a)(1) of the National Labor Relations Act, as amended ("Act"). Respondent has continued to maintain unlawful policies in its revised handbooks in effect from mid-2015 to the present. Because Respondent's current handbooks contain unlawful policies and because the earlier violative handbook policies were not fully remedied, Counsel for the General Counsel ("GC") respectfully seeks an order requiring Respondent to withdraw and/or replace the unlawful policies currently in effect and to post and distribute remedial notices at all of its facilities nationwide to cure all un-remedied unfair labor practices.

II. PERTINENT FACTS

On October 29, 2015, the Regional Director for Region 20 of the National Labor Relations Board ("Board") issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing alleging the commission of certain unfair labor practices by Respondent and setting a hearing date of February 9, 2016. Jt. Exh. E ("Complaint"). On February 3, 2016, Respondent and GC filed their Joint Motion to Submit Stipulated Record to the Administrative

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[1] As summarized in more detail, below, this case comes before the Honorable Administrative Law Judge ("ALJ") on a stipulated record. The exhibits referred to are the Joint Exhibits made a part of the parties' Submission of Joint Exhibits and Stipulation of Facts and will be referenced as "Jt. Exh. __." Related facts are taken from the same document and are referenced as "Stip. F. __."

Law Judge. The Joint Motion included a Stipulation of Issues Presented and a Submission of Joint Exhibits and Stipulation of Facts. The Charging Party signed only the Submission of Joint Exhibits and Stipulation of Facts. On February 5, the Honorable Dickie Montemayor, ALJ, issued an Order instructing the Charging Party to show cause by February 25 why the Joint Motion should not be granted. Following the Charging Party's submission of its Objections, ALJ Montemayor granted the pending Joint Motion and set a time for briefing. The Complaint contains allegations specifying Respondent's maintenance of certain policies violative of Section 8(a)(1) of the Act. Jt. Exh. E at ¶¶ 4-6.[2] Specifically, the Complaint alleges that Respondent maintained certain unlawful policies in its employee handbook from at least December 15, 2014 through July 2015, and then maintained further unlawful policies in its revised handbook since at least July 2015. *Id.* at ¶¶ 4-5. The Stipulated Facts, paragraphs 2(a), 4(d)-(g) & (i), demonstrate the following facts:

- At all material times, Respondent, an Oklahoma corporation with offices, distribution centers, and approximately 722 stores in all states but Alaska and Hawaii, and several stores throughout the State of California, including one in Sacramento, California, has been engaged in business as a retailer specializing in arts, crafts, hobbies, home decor, holiday, and seasonal products.
- From at least May 2011 through July 31, 2015, Respondent maintained the policies and rules included in its employee handbook, attached as Joint Exhibit H,

[2] The Complaint also alleges Respondent to be engaged in interstate commerce sufficient to meet the Board's jurisdictional requirements. The Stipulated Facts entered into by the parties make clear that Respondent is an "employer" within the meaning of the Act engaged in interstate commerce sufficient to justify the Board's assertion of jurisdiction. See Stip. F. ¶¶2-3.

said policies and rules having been applicable to all employees employed by and working for Respondent in the State of California.

- From at least March 2010 through June 30, 2015, Respondent maintained the policies and rules included in its employee handbook, attached as Joint Exhibit I, said policies and rules having been applicable to all employees employed by and working for Respondent in the states other than California.
- Beginning in August 2015, and continuing to the present, Respondent has maintained the policies and rules included in its employee handbook, attached as Joint Exhibit J, said policies and rules being applicable to all employees employed by and working for Respondent in the State of California.
- Beginning in July 2015, and continuing to the present, Respondent has maintained the policies and rules included in its employee handbook, attached as Joint Exhibit K, said policies and rules being applicable to all employees employed by and working for Respondent in the states other than California.
- At all times material, since at least March 2010, Respondent has distributed its employee handbooks to its employee hires as part of the employment process, and has required its employee hires to sign and return the Employee Handbook Receipt and Acknowledgment Form included in each handbook as a condition of employment.

The rules and policies at issue, therefore, have been distributed nationwide and in California in two separate iterations of Respondent's employee handbooks. Below, each of the policies alleged in the Complaint as unlawful will be analyzed in turn, beginning with the

policies contained in Respondent's handbooks in effect prior to the mid-2015 revisions. First, however, the GC will set out the analytical framework applicable to the allegations at hand.

III. ANALYTICAL FRAMEWORK

The GC alleges that Respondent has maintained the policies specified in the Complaint, and that the maintenance thereof has violated (and, where applicable, continues to violate) Section 8(a)(1) of the Act. In other words, the GC alleges that the policies are unlawful on their face.

An employer will violate Section 8(a)(1) through the mere maintenance of a work rule, even in the absence of enforcement. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enf'd mem., 203 F.3d 52 (D.C. Cir. 1999) ("Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement."). The appropriate inquiry is "whether the rule in question would reasonably tend to chill employees in the exercise of their Section 7 rights." *Id.* The Board refined this standard in *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646-47 (2004), by articulating a two-step inquiry for determining whether the maintenance of a rule violates Section 8(a)(1). The first step is to examine whether the rule explicitly restricts Section 7 activity. If not, the next step is to inquire as to whether 1) employees would reasonably construe the language of the rule to prohibit Section 7 activity; 2) the rule was promulgated in response to union activity; or 3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 647. Only the first step and the first part of the second step of this inquiry are at issue here.

Whether a rule may reasonably be read as impinging on employees' Section 7 rights must be determined from the perspective of a reasonable employee's viewpoint. *Lutheran Heritage*

Village-Livonia, 343 NLRB at 646-47; see also *Flex Frac Logistics, LLC*, 358 NLRB No. 127, 2012 WL 3993589, at *2 (Sept. 11, 2012), enf'd 746 F.3d 205 (5th Cir. Mar. 24, 2014); and see *Lily Transp. Corp.*, 362 NLRB No. 54, 2015 WL 1439930, at *1 n.2 (Mar. 30, 2015) (approving of the ALJ's reliance on the *Flex Frac* case despite its being issued by an invalidly constituted Board). Ambiguity contained in a challenged rule "must be construed against the [employer] as the promulgator of the rule." *Ark Las Vegas Restaurant*, 343 NLRB 1281, 1282 (2004). The drafter's intent is irrelevant, *Flex Frac Logistics, LLC*, *supra*, and extrinsic evidence of a link between the rule and restrictions on protected activity is not required in order to find that a rule is unlawfully overbroad or ambiguous by its terms. *Hills and Dales General Hosp.*, 360 NLRB No. 70, 2014 WL 1309713, at *1 (April 1, 2014); *Hoot Winc, LLC*, 363 NLRB No. 2, 2015 WL 5143098, at *1 (Sept. 1, 2015), citing cases.

IV. THE UNLAWFUL RULES CONTAINED IN RESPONDENT'S SINCE-REVISED EMPLOYEEHHANDBOOKS

The GC will first analyze the unlawful rules contained in Respondent's employee handbooks in effect through mid-2015 which have since been revised. See Jt. Exhs. H, I.

A. EMPLOYEE CONDUCT POLICY

Respondent maintained an "Employee Conduct Policy" in its employee handbook dated May 2011 and applicable to its employees working in California. Jt. Exh. H, at 29-30. The Policy begins by admonishing that employees "are expected to respect others and refrain from any conduct that might be harmful to coworkers or the Company, or that might be viewed unfavorably by current or potential customers." *Id.* at 29. The Policy goes on to include a non-exhaustive list 18 separate instances of conduct that may violate the policy, including the following:

> 8. Using language that is considered threatening, intimidating, coercive, abusive, profane, or inappropriate.
>
> 9. Verbal or physical conduct in violation of the Company's Policy Against Inappropriate Conduct. ****
>
> 13. Use of personal cellular phones (except in an emergency or with permission of the employee's supervisor), recording equipment, or other personal electronic devices (e.g., iPod, MP3 player, etc.) while on duty.
>
> 14. Interfering with the work performance of fellow employees, or creating an atmosphere that hinders or interferes with Company operations, or conduct that impacts the work environment in a negative manner. ****
>
> 16. Use of the Company's material, time or equipment for unauthorized purposes or for personal use. ****
>
> 18. Engaging in such other conduct as may be inconsistent with any of the Company's policies, procedures, practices, or rules.[3]

Id. at 29-30. The Policy ends by making clear that engaging in any of the specified instances of conduct may be grounds for discipline or termination. *Id.* at 30. Respondent's employee handbook applicable to its employees working outside California contains a near-identical iteration of the Policy. Jt. Exh. I, at 28-29.[4]

While not explicitly barring employees from engaging in Section 7 activity, the specified elements of the Policy reasonably tend to interfere with the exercise of those rights. In this regard, conduct example 14 broadly bars employees from "interfering with the work performance of fellow employees" and outlaws conduct that "interferes with Company operations" or "impacts the work environment in a negative manner." Such instruction may reasonably be read to encompass, *inter alia*, protected strike or other protest activity. *Purple*

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[3] The Complaint erroneously included a slightly altered version of conduct example 18, though numbered as 19. This error in the Complaint should be ignored.

[4] Of the quoted language, the only difference between the two is that conduct example 13 contained in the handbook of broader application (Jt. Exh. I) does not include the phrase "recording equipment."

Communications, Inc., 361 NLRB No. 43, 2014 WL 4764786, at *1, *9 (Sept. 24, 2014) (rule precluding the "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property," unlawful); *Heartland Catfish Co., Inc.*, 358 NLRB No. 125, 2012 WL 3993537 (Sept. 11, 2012) (rule "interfering with others in the performance of their jobs or engaging or participating in any interruption of work will be considered cause for immediate discharge;" unlawful).[5]

Conduct example 8 similarly imposes a broad bar on "threatening, intimidating, coercive, abusive, profane, or inappropriate" language. The Board has found similar instruction unlawful. *Three D, LLC*, 361 NLRB No. 31, 2014 WL 4182705, at *8 (Aug. 22, 2014) (Internet/Blogging rule barring "inappropriate discussions about the company, management, and/or co-workers," unlawfully ambiguous); *First Transit, Inc.*, 360 NLRB No. 72, 2014 WL 1321108, at *1 fn.5 (Apr. 2, 2014) ("Disloyalty" rules prohibiting "outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," and "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company," unlawful); *Hills & Dales General Hospital*, 360 NLRB No. 70, 2014 WL 1309713, at *1-*2 (Apr. 1, 2014) (rules outlawing "negative comments" and "negativity" and requiring employees to "represent [the Respondent] in the community in a positive and professional manner," ambiguous and unlawful); *Casino San Pablo*, 361 NLRB No. 148, 2014 WL 7330998, at *2, *5 (Dec. 16, 2014) (unlawful rule barring employees from making "false, fraudulent or malicious statements to or about a Team Member, a guest");

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[5] *Heartland Catfish Co.* was issued by a panel that under *Noel Canning* was not properly constituted. The Board appears to have adopted the pertinent holding in *Heartland Catfish Co.* in *Purple Communications, Inc.*, *supra*, 2014 WL 4764786, at *1, *9 (Sept. 24, 2014) (agreeing with the ALJ's determination and reasoning regarding a no-disruptions rule, where the ALJ relied on *Heartland Catfish Co.*). [Pearce, Hayes, and Griffin adptd Sept 11, 2012]

Claremont Resort & Spa, 344 NLRB 832, 832 (2005) (prohibiting "negative conversations about associates and/or managers," unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB at 287, 295 (rule unlawful that outlawed "[u]sing loud, abusive or foul language" inasmuch as the terms went undefined); *Care One at Madison Avenue, LLC*, 361 NLRB No. 159, 2014 WL 7339612, at *2, *5 (Dec. 16, 2014) (rule barring "threats of violence, including intimidation, harassment, and/or coercion" unlawful); *Cincinnati Suburban Press*, 289 NLRB 966, 966 n.2, 973-975 (1988) (employer's rule against, among other things, "unseeming conduct on or off Company premises or during non-working hours," unlawful); *2 Sisters Food Group*, 357 NLRB No. 168, 2011 WL 7052272, at *3 (Dec. 29, 2011) (rule subjecting employee to discipline for "inability or unwillingness to work harmoniously with other employees," vague and unlawful).

Conduct examples 13 and 16 are problematic for somewhat different reasons. "Generally, an employer's ban on solicitation that is not limited to working time, or on distribution of literature that is not limited to working time and working areas, is presumptively invalid." *Casino San Pablo*, *supra*, 2014 WL 7330998, at *5, citing cases. Moreover, employees enjoy protection to make videos or recordings in furtherance of Section 7 protected activity. See, e.g., *Hawaii Tribune-Herald*, 356 NLRB No. 63, 2011 WL 549435, at *1 (Feb. 14, 2011), enfd sub nom. *Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *White Oak Manor*, 353 NLRB 795, 795 (2009), incorporated by reference, 355 NLRB 1280 (2010), enforced mem., 452 F. App'x 374 (4th Cir. 2011). Finally, under *Purple Communications*, 361 NLRB No. 126 (2014), employees have a presumptive right to engage in protected

communications off work time on electronic means of communication otherwise provided by the employer.[6] See, e.g., *UPMC*, 362 NLRB No. 191, 2015 WL 5113234, at *1-*3 (Aug. 27, 2015).

Here, conduct example 13 broadly bans use of personal electronic devices "while on duty." Because the instruction is not limited to non-work time, it suffers from the defect of being reasonably interpreted to bar protected communications engaged in while "on duty" but not on work time, such as on breaks or lunch. See, e.g., *Guardsmark, LLC*, 344 NLRB 809, 809, 810-11 (2007) enfd *Guardsmark, LLC v. NLRB*, 475 F.3d 369 (D.C. Cir. 2007) (rule barring solicitation "at all times while on duty or in uniform," unlawful). The rule further suffers from ambiguity inasmuch as it can reasonably be read to bar protected solicitations in work areas. *Id.* at 811 n.4. Example 13 further fails because it may reasonably be read to bar use of one's personal electronic devices in furtherance of protected activity. *Hawaii Tribune-Herald*, *supra*. Finally, Example 16 is ambiguous inasmuch as it may reasonably be read to encompass protected email communications off work time. *UPMC*, *supra*. This is especially true given the overly broad nature of Respondent's Email Usage and related policies, discussed below. See,

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[6] As discussed in more detail, below, related handbook policies make clear that employees may gain access to email and other electronic means of communication and equipment in the course of their work. For example, under the heading "Use of Computers, Email, Internet, Phones and Voicemail Policy," Respondent's handbook states in part: "Providing, exchanging and retrieving information electronically by utilizing computer technology presents valuable opportunities for the Company. While employees are encouraged to use this technology, its use carries important responsibilities. **** Computers, computer systems and electronic media equipment (including computer accounts, voicemail, laptop computers, printers, networks, software, electronic mail, Internet and World Wide Web access connections) at the Company are provided for the use of employees for Company business-related use. **** The use of information systems is a privilege extended by the Company…." Jt. Exhs. H, at p. 34, I at p. 35. The Policy has many sub-parts detailing usage of, inter alia, Respondent's email system. *Id.* at pp. 36, 37. Thus, it matters not that conduct example 16 fails explicitly to grant employees access to communications systems, for that access is referred to elsewhere in the handbook and is obviously related thereto. See, e.g., *Longs Drugs Stores of Cal., Inc.*, 347 NLRB 500, 500-01 (2006) (reading confidentiality provisions in light of related provisions).

e.g., *Longs Drugs Stores of Cal., Inc.*, 347 NLRB 500, 500-01 (2006) (reading confidentiality provisions in light of related provisions to discern meaning); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), enfd. as modified 414 F.3d 1249 (10th Cir. 2005) (communication rule unlawful in light of link between unlawful confidentiality rule and the communication rule).

Conduct example 9 must necessarily be read with Respondent's Policy Against Inappropriate Conduct, which is discussed in the section immediately below. *Longs Drugs Stores of Cal., Inc.*, *supra*; *Double Eagle Hotel & Casino*, *supra*. Suffice it to say that, for the reasons advanced regarding the Policy Against Inappropriate Conduct, conduct example 9 amounts to an additional overbroad and unlawful rule.

Finally, conduct example 18's broad preclusion of activity running afoul of Respondent's other policies or rules necessarily captures any such rules shown herein to be overly broad and unlawful. Therefore, number 18 is itself overly broad and unlawful. See e.g., *Double Eagle Hotel & Casino*, 341 NLRB at 115 (communication rule unlawful in light of link between unlawful confidentiality rule and the communication rule).

For the reasons discussed above, Respondent's Employee Conduct Policy contains numerous overbroad elements that may reasonably be interpreted as restricting Section 7-protected activity and therefore violate Section 8(a)(1) of the Act.

B. POLICY AGAINST INAPPROPRIATE CONDUCT - REPORTING INAPPROPRIATE CONDUCT

Respondent maintained the following "Policy Against Inappropriate Conduct" in its employee handbook dated May 2011 and applicable to its employees located in California:

> The Company prohibits unlawful harassment and discrimination and other conduct that is inappropriate for the workplace. "Inappropriate Conduct" means comments or actions that are inappropriate for the workplace, disrupt and/or interfere with work performance, or negatively or stereotypically relate to an employee's race, color, religion, gender,

> pregnancy, national origin, age, disability, Veteran's status, or other characteristics protected by law. Inappropriate Conduct includes unlawful harassment and discrimination, as well as unlawful sexual harassment as defined below.

Jt. Exh. H, at 30. Under the heading "Reporting Inappropriate Conduct," the handbook goes on to state that employees "must immediately report" instances of Inappropriate Conduct to a supervisor or other manager. *Id.* at 31. Respondent's employee handbook applicable to its employees working outside California contains identical iterations of these Policies. Jt. Exh. I, at 29-30.

The key ambiguity in this Policy is its reference to conduct that may "disrupt and/or interfere with work performance." Again, this language may reasonably be interpreted as encompassing protected strike or similar conduct. See, e.g., *Purple Communications, Inc.*, *supra*, 2014 WL 4764786, at *1, *9 (rule precluding the "[c]ausing, creating, or participating in a disruption of any kind during working hours on Company property"); *Heartland Catfish Co., Inc.*, *supra*, 2012 WL 3993537, at *1, *9 (rule "interfering with others in the performance of their jobs or engaging or participating in any interruption of work will be considered cause for immediate discharge").

In addition, the Policy's reporting requirement is also unlawful inasmuch as it may require employees to report protected conduct to Respondent management. *UPMC*, *supra*, 2015 WL 5113234, at *4; see also *Dunes Hotel*, 284 NLRB 871, 878 (1987) (finding unlawful a request in an overly broad no-solicitation/no-distribution rule that an employee report on the protected activity of fellow employees).

C. CONFIDENTIALITY POLICY

Respondent maintained a "Confidentiality Policy" in its California handbook that generally barred employees from sharing confidential business-related information. Jt. Exh. H.,

at 31. However, in providing a list of information intended to "guide" employees regarding Respondent's view of what constitutes confidential information, Respondent included the following:

- Confidential data about employees, including employee pay rates and performance evaluations; and
- Any information that if disclosed, could adversely affect the Company's business.

Id. Respondent's handbook of broader applicability contained an identical Confidentiality Policy. Jt. Exh. I, at 30.

Respondent's Confidentiality Rule, with its inclusion of "data about employees, including employee pay rates and performance evaluations" in its definition of what is to be considered "confidential," will be read by a reasonable employee to preclude them from engaging in the protected conduct of sharing wage and other work-related information and is therefore unlawful. See, e.g., *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3 (1999) (rule admonishing that employees "will not reveal confidential information regarding our customers, fellow employees, or Hotel Employees," unlawful); see also *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, 2014 WL 3778347, at *1-*4 (July 31, 2014) (unlawful rule instructing employees to "Keep customer and employee information secure. Information must be used fairly, lawfully and only for the purpose for which it was obtained"); *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001) (instructing employees that information "about…employees is strictly confidential [and]…must not be disclosed to anyone"). Appeals courts have approved this approach. See, e.g., *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007) (enforcing Board decision that found unlawful a rule requiring employees to maintain "confidentiality of any information concerning the company, its business plans, [and] its partners [i.e., employees]").

Likewise, barring the release of information vaguely described as "adversely affect[ing] the Company's business" will be read by the reasonable employee to reach the sharing of information protected by Section 7 and is unlawful. See, e.g., *First Transit, Inc.*, 360 NLRB No. 72, 2014 WL 1321108, at *1 n.5 (Apr. 2, 2014) ("Disloyalty" rules prohibiting "outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," and "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company," unlawful); *Knauz BMW,* 358 NLRB No. 164, 2012 WL 4482841, at *1-*3 (Sept. 28, 2012) ("Courtesy" rule applying to inter-employee relations and admonishing "No one should be disrespectful or use profanity or any other language which injures the image or reputation of the Dealership," may reasonably be read to encompass protected communications). [7] This is especially true where, as here, the rule also includes in its definition a prohibition on sharing materials which are clearly encompassed by Section 7. See *Longs Drugs Stores of Cal., Inc.*, 347 NLRB at 500-01 (reading confidentiality provisions in light of related provisions to discern meaning). In short, the quoted portions of the Confidentiality Policy rendered it unlawful on its face.

D. BULLETIN BOARDS POLICY

Respondent's 2011 California handbook contained a "Bulletin Boards Policy" forbidding employees from posting materials on specified Respondent-maintained boards. Jt. Exh. H, at 32. The Policy goes on, however, to state:

> In some locations, additional bulletin boards may be reserved for employees to post information of interest to fellow employees. Employees should confirm that a bulletin board is for employee use before posting information on it. These boards will be

[7] *Knauz BMW* was issued by a panel that under *Noel Canning* was not properly constituted. It is the General Counsel's position that *Knauz BMW* was soundly reasoned, and the General Counsel therefore will urge that the Board adopt the *Knauz BMW* rationale as its own.

> monitored by management. Any posting that contains information deemed inappropriate, disruptive, or in violation of Company policy will be removed. Postings will be removed every Friday regardless of when the postings were placed on the board.

Id. Respondent's 2010 handbook of broader applicability contains the identical Bulletin Boards Policy. Jt. Exh. I, at 30-31

This Policy's instruction that boards provided for employee use "will be monitored by management," who will remove material deemed "inappropriate, disruptive, or in violation of Company policy" suffers from much the same ambiguities as Employee Conduct Policy point 8, discussed above. See, e.g., *Three D LLC*, 361 NLRB No. 31, 2014 WL 4182705 (Aug. 22, 2014) (rule unlawful that prohibited "innapropriate" discussions without providing examples of innapropriate conduct); *Flamingo Hilton-Laughlin*, 330 NLRB at 287, 295 (rule unlawful that outlawed "[u]sing loud, abusive or foul language" inasmuch as the terms went undefined). Moreover, inasmuch as the rule incorporates other rules shown here to be unlawful by its inclusion of materials deemed "in violation of Company policy," the instruction necessarily interferes with employees' Section 7 conduct. The Bulletin Boards Policy is therefore unlawful.

E. SOLICITATIONS AND DISTRIBUTIONS OF LITERATURE POLICY

Respondent's 2011 California handbook contained the following "Solicitations and Distributions Policy:"

> In the interest of maintaining a proper business environment and preventing interference with work and any inconvenience to others, employees may not distribute literature or printed materials of any kind, sell merchandise, solicit financial contributions, or solicit for any other cause during work time. During work time, items of this nature shall not be in the immediate physical possession or control of the employee, and must either be kept in the employee's personal locker or outside of the physical work place, (i.e., an employee's automobile). Employees who are not on work time (e.g., those on break) may not solicit for any cause or distribute literature of any kind to employees who are on work time. Employees may not sell merchandise on Company property. Furthermore, employees may not distribute literature or printed material of any kind in work areas at any time.

> Non-employees are likewise prohibited from distributing material or soliciting employees on Company premises at any time, unless prior approval is obtained from the Company.

Jt. Exh. H, at p. 32. Respondent maintained the identical Policy in its 2010 handbook of broader application. Jt. Exh. I, at p. 31.

As already stated, a ban on "distribution of literature that is not limited to working time and working areas[] is presumptively invalid. *Casino San Pablo*, *supra*, 2014 WL 7330998, at *5, citing cases; see also *Guardsmark, LLC*, 344 NLRB at 811 n.4. Here, Respondent's Policy goes well beyond limiting distributions to non-work areas. Rather, it prohibits the carriage of any materials at all by its employees, whether they are distributing or not. Certainly, the plain language of the rule is reasonably read to prohibit keeping distribution materials on one's possession even in a break room, lunch room, or other non-work area. The Distributions aspect of the Policy is, therefore, unlawful.

F. LOITERING POLICY

Respondent maintained the following "Loitering Policy" in its 2011 California handbook:

> In the interest of maintaining a safe and efficient working environment, employees may not enter Company property more than 30 minutes before they are scheduled to clock in and/or report to work. Further, employees may not remain on Company property more than 30 minutes after clocking out and/or completing their workday. Company security or management will direct employees found on Company property in violation of this Policy to immediately leave. Employees violating this Policy may be subject to disciplinary action, up to and including termination of employment.

Jt. Exh. H, at p. 32. Respondent maintained the identical Loitering Policy in its 2010 handbook of broader application. Jr. Exh. I, at p. 31.

In *Tri-County Medical Ctr.*, 222 NLRB 1089, 1089 (1976), the Board held that an employer's rule barring off-duty employees from access to its facility is valid only if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly

disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. The rule suffers from ambiguity inasmuch as it bars off-duty employees from "Company property," which may reasonably be read to include parking lots and other outdoor, non-working areas. See, e.g., *Doane Pet Care, DPC*, 342 NLRB 1116, 1116 n.2, 1118, 1121-22 (2004) (prohibiting employees from "Entering the premises during non-working hours without permission, or failure to leave the premises within thirty minutes after the end of the shift," unlawful); *Mediaone of Greater Florida, Inc.*, 340 NLRB 277, 277 (2003) (prohibiting employees from "entering company property after hours without authorization", unlawful). The Loitering Policy is unlawful.

G. APPEARANCE AND DRESS CODES POLICY - ALL RETAIL STORE LOCATIONS DRESS CODE

In its 2011 California handbook, Respondent maintained an "Appearance and Dress Codes Policy" that generally instructed employees to dress professionally and appropriately. Jt. Exh. H, at 33. The Policy also contained the following text: "Furthermore, when an employee's appearance causes disruption in the workplace and/or the creation of an uncomfortable working environment for others, corrective, disciplinary action will result." *Id.* The Policy later makes clear that failure to comply with the pertinent standards may lead to discipline up to and including termination. *Id.* Under a separate heading entitled "All Retail Store Locations Dress Code," Respondent included a non-exhaustive list of inappropriate attire, including: "6. Foul, offensive, or controversial clothing and/or accessories." *Id.* Respondent maintained the identical policies in its 2010 handbook of broader application. Jt. Exh. I, at 32-33.

Here, a reasonable employee would read the key phrases of the Policies—"causes disruption," "creation of an uncomfortable working environment," and "controversial clothing

and/or accessories"—as potentially encompassing protected garb, such as union hats, buttons, stickers or other accessories bearing protected communication. See, e.g, *Lily Transp. Corp., supra*, 2015 WL 1439930, at *5-*6 (rule barring all logos other than the company's, unlawful); *Alternative Community Loving, Inc.*, 362 NLRB No. 55, 2015 WL 1457681, at *3 (Mar. 31, 2015) (code prohibiting "shirts with commercial or political advertisements," unlawful); *Hills & Dales General Hospital*, supra, 2014 WL 1309713, at *1-*2 (rule outlawing "negative comments" and "negativity," ambiguous and unlawful). The Dress Codes are overbroad and unlawful.

H. COMPUTER USAGE - EMAIL USAGE - CELL PHONE OR SMART PHONE USAGE - VOICEMAIL USAGE

Under the broader umbrella of a policy entitled "Use of Computers, Email, Internet, Phones and Voicemail Policy," Respondent maintained in its 2011 California handbook separate policies relating to each of the stated modes of communication. Jt. Exh. H, at 34-38. As to each, Respondent maintained the following:

- Computer Usage: The following Policy relates to the responsible use of computers and computer service and electronic media resource at the Company: **** 2. Fraudulent, harassing, threatening, discriminatory, inappropriate, sexually explicit or obscene messages and/or materials are not to be transmitted, printed, requested or stored. Chain letters, solicitations and other forms of mass emails are not permitted. Email may not be used to solicit donations or support on behalf of individuals or organizations. [*Id.* at 34.]

- Email Usage: Employees are permitted to use the Company's email system only as provided below. **** If there is evidence that an employee is not adhering to the proper use of email, the Company reserves the right to take disciplinary action, up to and including termination of employment. Employees are prohibited from: 1. Sending or forwarding emails containing defamatory, offensive, discriminatory, inappropriate, or obscene remarks. If an employee receives an email of this nature, the employee must promptly notify his/her supervisor. **** 3. Sending unsolicited email messages, jokes, anecdotes, chain mail, non-work related photos or mass email. **** [*Id.* at 36.]

- Cell Phone or Smart Phone Usage: All Company issued cell phones are subject to the same provisions within this Policy for computer, email, telephone, internet, and voicemail usage. Personal phones connected to the Company network are also subject to the same provisions within this Policy, with respect to protection of Company security, contacts, documents, and other data. **** [*Id.* at 38.]

- Voicemail Usage: **** Harassing, threatening, discriminatory, inappropriate, sexually explicit or obscene messages are not to be transmitted or stored. The use of voicemail for any reason other than legitimate business purposes of the Company is prohibited. **** Any activity that could damage the Company's reputation or potentially put employees and the Company at risk for legal proceedings by any party is prohibited. [*Id.* at 38.]

Respondent maintained identical policies in its 2010 handbook of broader application. Jt. Exh. I, at 35-40.

As explained above in relation to examples 13 and 16 of Respondent's Employee Conduct Policy, employees have a presumptive right to engage in protected communications off work time on electronic means of communication provided by the employer. *Purple Communications*, *supra*; *UPMC*, *supra*, 2015 WL 5113234, at *1-*3. Respondent's policies relating to usage of computers, emails, and the like make clear that Respondent provides electronic means of communication for its employees to use in the workplace and, indeed, expects them to utilize those means of communication. For example, Respondent's handbook states in part:

> Providing, exchanging and retrieving information electronically by utilizing computer technology presents valuable opportunities for the Company. While employees are encouraged to use this technology, its use carries important responsibilities. **** Computers, computer systems and electronic media equipment (including computer accounts, voicemail, laptop computers, printers, networks, software, electronic mail, Internet and World Wide Web access connections) at the Company are provided for the use of employees for Company business-related use.

Jt. Exhs. H at 34, I at 35. The related Computer Usage and Software and Software Licensing policies include various restrictions concerning employee manipulation of software and

hardware, thus clearly contemplating employee usage. Jt. Exhs. H, at p. 34-35, I at p. 35-36. Perhaps most tellingly, Respondent's Email Usage policy provides: "Although the Company's email system is meant for business use, the Company allows personal usage if it is reasonable and does not interfere with business operations." Jt. Exhs. H, at 36, I at 37. In short, Respondent's own handbook policies demonstrate that employees have access to email and other mediums in order to engage in electronic workplace communications.

Respondent's Computer Usage policy explicitly bars "solicitations" or emails "used to solicit . . . support on behalf of individuals or organizations." If it does not explicitly do so, the language is reasonably read to forbid Section 7-protected email communications and thus runs afoul of *Purple Communications* and its progeny. The Email Usage policy only muddles the water by barring "offensive" or "inappropriate" emails, "unsolicited email messages," "mass email" and "non-work related photos." Barring "unsolicited email messages" and "mass email" is overbroad and again runs afoul of the Board's ruling in *Purple Communications*. The prohibition against sharing "non-work related photos" may reasonably be read to include recordings made in furtherance of Section 7-protected activity, and thus import further illegality into the Policy. E.g., *Hawaii Tribune-Herald*, supra, 2011 WL 549435, at *1; *White Oak Manor*, 353 NLRB at 795. Finally, inclusion of vague terms such as "offensive" and "inappropriate" instill further ambiguity into the policy and may reasonably be read as encompassing Section 7 communication. E.g., *Three D, LLC*, *supra*, 2014 WL 4182705, at *8 (Internet/Blogging rule barring "inappropriate discussions about the company, management, and/or co-workers"); *Hills & Dales General Hospital*, *supra*, 2014 WL 1309713, at *1-*2 (Apr. 1, 2014) (rule outlawing "negative comments" and "negativity"); *Claremont Resort & Spa*, 344 NLRB at 832 (prohibiting "negative conversations about associates and/or managers"); *Flamingo Hilton-Laughlin*, 330

NLRB at 287, 295 (outlawing "[u]sing loud, abusive or foul language"). For these reasons, the Computer Usage and Email Usage policies are unlawful.

Respondent's Voicemail Policy runs afoul of Section 8(a)(1) of the Act because its preclusion of "harassing" and "inappropriate" messages that may be considered not related to "legitimate business purposes" or that could "damage the Company's reputation or potentially put employees and the Company at risk for legal proceedings by any party" reasonably may be read as barring protected activity such as concertedly voicing disapproval with managers, supervisors or Respondent's working conditions more generally (e.g., *Casino San Pablo*, *supra*, 2014 WL 7330998, at *3-*4, citing cases in which rules were found to reasonably be read as precluding protected criticisms of managers or the respondent company),[8] or reaching out to other employees in support of a wage claim, harassment claim, or other legal matter. E.g., *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, 2014 WL 3919910 (Aug. 11, 2014) (employee seeking co-worker signatures on a petition in support of sexual harassment allegations was concerted activity protected by Section 7); *Le Madri Restaurant*, 331 NLRB 269, 269 n.2, 275 (2000) ("the filing of a civil action by employees" is generally protected, and citing cases); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953) (circulating petition in support of filing of FLSA wage claim, protected).

Finally, the Cell Phone and Smart Phone Usage policy explicitly subjects company-issued phones to the policies relating to, *inter alia*, computer, email and voicemail usage.

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[8] See also *Costco Wholesale Corp.*, 358 NLRB No. 106, 2012 WL 3903806, at *1 (Sept. 7, 2012) (rule barring electronic postings that "damage the Company, defame any individual or damage any person's reputation," unlawful.). The pertinent holdings in *Costco Wholesale Corp.*, a decision issued by an invalidly-constituted Board under *Noel Canning*, appear to have been adopted by the Board in its decision in *Hills and Dales General Hosp.*, 360 NLRB No. 70, 2014 WL 1309713, at *2 (Apr. 1, 2014).

Inasmuch as the Computer and Email policies are reasonably read to bar Section 7-protected activity (as discussed immediately above), and inasmuch as a company-issued phone may be used to access email and other internal electronic communications, the Cell Phone and Smart Phone usage policy is likewise unlawful. *Longs Drugs Stores of Cal., Inc.*, 347 NLRB at 500-01; *Double Eagle Hotel & Casino*, 341 NLRB at 155. Moreover, the Cell Phone policy's importation of Respondent's other policies relating "to protection of Company security, contacts, documents, and other data" presumably (and reasonably) encompasses the Confidentiality Policies shown to be unlawful above in section IV.C. *Id.* For these reasons, the Cell Phone and Smart Phone policy is unlawful.

V. THE UNLAWFUL RULES CONTAINED IN RESPONDENT'S CURRENT EMPLOYEE HANDBOOKS

The GC will next analyze the unlawful rules contained in Respondent's current versions of its employee handbooks, i.e., the handbooks in effect since mid-2015. See Jt. Exhs. J, K. As shown, Respondent continued to maintain policies identical or nearly identical to many of those discussed above.

A. EMPLOYEE CONDUCT RULES

Under the slightly altered title "Employee Conduct Rules," Respondent maintained in its August 2015 California handbook a list of 19 examples of prohibited conduct quite similar to the list of 18 examples listed in its "Employee Conduct Policy" maintained in its prior handbooks. Cf. Section IV.A, *supra*, with Jt. Exh. J, at p. 28. Broadly, the new "Rules" admonish that employees are expected to "conduct themselves in an appropriate and respectful manner," "use good judgment and common sense in making work-related decisions," and (iii) "refrain from conduct that might be harmful to coworkers or the Company's business or reputation." Jt. Exh.

J, at 28. There follows a non-exhaustive list of 19 examples of unacceptable conduct, including the following:

> 8. Using language that is threatening, intimidating, coercive, abusive, profane, or inappropriate.
>
> 9. Conduct inconsistent with the Company's Policy Against Inappropriate Conduct.
> ****
> 14. Interfering with the work performance of fellow employees, or creating an atmosphere that hinders or interferes with Company operations.
>
> ****
>
> 16. Use of the Company's material, time or equipment for unauthorized purposes.
>
> ****
>
> 19. Engaging in other conduct that is inconsistent with any of the Company's policies, procedures, practices, or rules.[9]

The Conduct Rules end by making clear that violation of the Rules may be grounds for discipline or termination. *Id.* at 28. Respondent's July 2015 employee handbook applicable to its employees working outside California contains a near-identical iteration of the Employee Rules. Jt. Exh. K, at 27 – 28.

These rules are virtually identical to those set forth in the 2010 and 2011 handbooks. Jt. Exhs. H, I. In example 8, the only change was to remove the word "considered" before "threatening." In example 9, the words "verbal or physical" were stricken prior to "conduct" and the term "inconsistent" was substituted for the previous term, "in violation." The wording of example 14 is absolutely identical, with the final clause "or conduct that impacts the work

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[9] The Complaint contains some errors in quoting the language from the updated Rules. The Rules as they appear here are quoted from the Handbook verbatim. Cf. Jt. Exhs. E at ¶5(a) and Jt. Exh. J, at 28. In addition, not unlike the erroneous reference contained in Complaint paragraph 4(a) to near-identical conduct examples appearing at numbers 18 and 19, the assignment in Complaint paragraph 5(a) of near identical Rules to numbers 18 and 19 is erroneous; the reference to an unlawful Rule at number 18 should be ignored.

environment in a negative way" having been deleted. Similarly, the revised wording of example 16 is identical to the previous edition, but the phrase "or for personal use" has been deleted. Finally, example 19 in the revised rules is the same as paragraph 18 of the previous edition except that the word 'such' was eliminated from the phrase "other such conduct" and the phrase "as may be" was changed to "that is." Jt Exh. H, at 29-30. None of these changes are substantive in any way. The meaning of the employee conduct rules and examples remains unchanged, and therefore they are unlawful for the same reasons as the versions contained in the previous handbooks.

As argued above in Section III.A., example 14 may reasonably be read to encompass, *inter alia*, protected strike or other protest activity. *Purple Communications, Inc.*, supra, 2014 WL 4764786, at *1, *9; *Heartland Catfish Co., Inc*, 358 NLRB No. 125 (September 11, 2012). The conduct barred in example 8 is similarly overly broad and therefore runs afoul of the Act. The Board has frequently found such rules to be violative, as discussed in detail above. Conduct example 9 is also overly broad and unlawful, relying upon an unlawful Policy Against Inappropriate Conduct which was discussed in Section III.B. Example 16 can be read to bar protected activity by the prohibiting "unauthorized activity" without defining "unauthorized activity". Furthermore, it fails to allow the use of company equipment, including email, for protected concerted activity. As discussed above, employees have a presumptive right to engage in protected communications off work time on electronic means of communication otherwise provided by the employer. See, e.g., *UPMC*, supra. Finally, conduct example 19's broad ban on activity running afoul of Respondent's policies or rules inherently includes those rules shown herein to be overly broad and unlawful. Therefore, number 19 is itself overly broad and unlawful. See e.g., *Double Eagle Hotel & Casino*, 341 NLRB at 115.

B. POLICY AGAINST INAPPROPRIATE CONDUCT – REPORTING INAPPROPRIATE CONDUCT

Respondent maintained the following "Policy Against Inappropriate Conduct" in its employee handbook dated August 2015 and applicable to its employees located in California:

> The Company prohibits inappropriate conduct. Inappropriate conduct means comments or actions that are inappropriate for the workplace, disrupt and/or interfere with work performance, or negatively or stereotypically relate to an employee's race, color, religion, gender, pregnancy, national origin, age, disability, genetic information, Veteran's status, and other status, condition or characteristic protected by law. Inappropriate conduct includes unlawful harassment and discrimination, as well as unlawful sexual harassment as defined below.

Jt. Exh. J, at 29. Under the heading "Reporting Inappropriate Conduct," the handbook goes on to state that employees "must immediately report" instances of Inappropriate Conduct to a supervisor or other manager. *Id.* Respondent's employee handbook of broader applicability dated July 2015 contains an identical Policy Against Inappropriate Conduct followed by identical mandatory reporting language. Jt. Exh. K, at 28.

The definition of inappropriate conduct in the 2005 employee handbooks is copied verbatim from the earlier versions analyzed above in Section III.A. The 2015 "Policy Against Inappropriate Conduct" is therefore unlawful for same reasons. Namely, by defining inappropriate conduct as that which may "disrupt and/or interfere with work performance" it may reasonably be interpreted as encompassing protected strike or similar conduct. See, e.g., *Purple Communications, Inc.*, *supra*, 361 NLRB No. 43 at *1, *9. By requiring that employees report inappropriate conduct to a supervisor or other manager, the policy also runs afoul of the Act by mandating employees to report concerted activity to a supervisor. See, *UPMC*, *supra*, 362 NLRB No. 191 at *4; see also *Dunes Hotel*, *supra*, 284 NLRB at 878.

C. CONFIDENTIALITY POLICY

Respondent maintained in its California employee handbook dated August 2015 a confidentiality policy that specifically prohibits employees from disseminating information that "could adversely affect the Company's business." Jt. Exh. J at 10. The 2015 employee handbook of broader application contains an identical confidentiality policy. Jt. Exh. K at 9. This language is so broad it may reasonably be construed by employees to encompass protected concerted activity such as criticizing their employer or engaging in other employee discussions protected by Section 7. As discussed in more detail above, such "disloyalty" or "courtesy" rules have found to be unlawful by the Board. See, e.g., *First Transit, Inc.*, *supra*, 360 NLRB No. 72; *Knauz BMW, supra*, 358 NLRB No. 164.

Both of the 2015 confidentiality policies have omitted language present in the earlier iterations that prohibited employees from sharing information about pay rates.[10] The simple removal of the pay rate language without notifying employees of the change or why the previous language was removed does not cure the violation. See *Passavant Memorial Area Hospital*, 237 NLRB 138, 138 (1978).

D. BULLETIN BOARDS POLICY

Respondent's California handbook of 2015, and the broader handbook of 2015, contain the exact same "Bulletin Boards Policy" forbidding employees from posting materials on specified Respondent-maintained boards. Jt. Exh. J at 9; Jt. Exh. K at 9. The 2015 Policy is identical to the one promulgated in the 2010 and 2011 employee handbooks. For the same reasons set forth above in Section III.D., the 2015 bulletin board policy is unlawful.

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[10] The language prohibiting the dissemination of pay rate information is analyzed in detail above in Section III.C.

E. SOLICITATIONS AND DISTRIBUTIONS OF LITERATURE POLICY

Respondent maintained a non-solicitation and distribution policy in the 2015 California handbook virtually identical to the previous version. The only difference in the two-paragraph policy was the elimination of the clause "of any kind" after the term "printed material." Jt. Exh. J at 9. Otherwise, the old and new versions of the non-solicitation and distribution policy are exactly the same. The current handbooks for California and of broader application are entirely identical. Jt. Exh. J at 9; Jt. Exh. K at 9. As already stated, a ban on "distribution of literature that is not limited to working time and working areas[] is presumptively invalid. *Casino San Pablo*, *supra*, 2014 WL 7330998, at *5, citing cases; see also *Guardsmark, LLC*, 344 NLRB at 811 n.4. In addition, the distribution ban forbids employees from having materials on their person even when not on working time or in work areas. Such a blanket ban undoubtedly infringes upon the Section 7 rights of employees to engage in concerted activity not on work time and in non-work areas. For these reasons and those stated above in Section III.E, the current no solicitation and distribution policy is unlawful.

F. LOITERING POLICY

Respondent's 2015 handbooks for California and of broader application contain the following loitering policy:

> In the interest of maintaining a safe and efficient working environment, employees may not enter Company property more than thirty (30) minutes before they are scheduled to clock in and/or report to work. Further, employees may not remain on Company property more than thirty (30) minutes after clocking out and/or completing their workday. Company security or management will direct employees found on Company property in violation of this Policy to immediately leave. Employees violating this Policy may be subject to disciplinary action, up to and including termination of employment.

Jt. Exh. J at 29; Jt. Exh. K at 29. This is the same policy verbatim as the previously issued handbooks analyzed above in Section III.F.

As noted above, an employer's rule barring off-duty employees from access to its facility is valid only if it: (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Tri-County Medical Ctr.*, 222 NLRB at 1089. Here, the loitering rule suffers from ambiguity inasmuch as it bars off-duty employees from "Company property," which may reasonably be read to include parking lots and other outdoor, non-working areas. See, e.g., *Doane Pet Care, DPC*, 342 NLRB at 1116 n.2, 1118, 1121-22; *Mediaone of Greater Florida, Inc.*, 340 NLRB at 277. The 2015 Loitering Policy is therefore unlawful.

G. APPEARANCE AND DRESS CODES POLICY – ALL RETAIL STORE LOCATIONS DESS CODE

Respondent's 2015 handbooks for California and of broader application contained a virtually identical appearance and dress policy as the 2010 and 2011 handbooks. The relevant language cited here is entirely the same, with the notable exception that the word "may" was changed from "will" in the earlier versions:

> When an employee's appearance causes disruption in the workplace and/or the creation of an uncomfortable working environment for others, corrective, disciplinary action may result.

Jt. Exh. J 30; Jt. Exh. K 29. The policy then lists examples of inappropriate attire under the "All Retail Store Locations Dress Code", including item 6 which states, "Foul, offensive, or

controversial logos, language or emblems on clothing and/or accessories."[11] Just as in the 2010 and 2011 versions, a reasonable employee would read the key phrases of the appearance and dress policy —"causes disruption," "creation of an uncomfortable working environment," and "controversial logos, language or emblems"—as potentially encompassing protected garb, such as union hats, buttons, stickers or other accessories bearing protected communication. See, e.g, *Lily Transp. Corp.*, 362 NLRB No. 54 at *5-*6; *Alternative Community Loving, Inc.*, 362 NLRB No. 55; *Hills & Dales General Hospital*,360 NLRB No. 70 at *1-*2. The 2015 appearance and dress code policies are overbroad and unlawful.

H. TECHNOLOGY USE POLICY

In the 2015 employee handbooks, Respondent eliminated the separate categories of computer, email, cell phone, and voicemail usage policies and replaced them with a singular "Technology Use Policy" instead. Jt. Exh. J at 31; Jt. Exh. K at 33. The policy offers the following definition:

> "Technology" includes, but is not limited to, Company provided hardware, software, networks, systems, devices, electronic media, applications, accounts, privileges, access, internet, email, voicemail, phones, and wearable technology.

Jt. Exh. J at 31; Jt. Exh. K at 33. The Technology Policy offers guidance on how to use the various technologies supplied by Respondent before setting out examples of prohibited conduct. Those prohibitions include:

> 5. Creating, transmitting, printing, or storing any information containing defamatory, unlawful, offensive, harassing, threatening, discriminatory, inappropriate, or obscene content, or that otherwise violates Company policy (if an employee receives information of this nature, the employee must promptly notify management);

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[11] The previous edition of the handbook discussed at Section III.G. contained a slightly different example 6. It stated:
"Foul, offensive, or controversial clothing and/or accessories." Jt. Exh. H at 33.

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10. Using Technology in an unauthorized way or that otherwise causes damage or loss to the Company.

Jt. Exh. J at 31; Jt. Exh. K at 33.

Example 5 is overly broad in that it uses phrases such as "containing defamatory…offensive…inappropriate…content" that could be reasonably interpreted to include protected Section 7 activity. It also prohibits conduct in violation of other Company polices, many of which are unlawful. Example 10 restricts the use of technology, including email and social media, in any way that "causes damage" to Respondent. An employee may reasonably read these examples to prohibit criticism of the employer in accordance with Section 7. Prohibitions that disparage employees from making critical comments of an employer, including comments in furtherance of Section 7 activity, are unlawful. See, e.g. *Costco Wholesale Corp.*, 358 NLRB No.106, 2012 WL 3903806 at 2 (September 7, 2012) (Board held a rule prohibiting employees from posting online comments that "damage the Company" or "defame" any individual to be unlawful); *UPMC*, 362 NLRB No. 191 at 6 – 7 (finding technology use policy that prohibited employees from using technology to "disparage" or "make false or misleading" statements about the employer unlawful). The revised Technology Use Policy may also be reasonably read to forbid Section 7-protected email communications. It thus runs afoul of *Purple Communications*, supra, in which the Board found employees have a right to engage in Section 7-protected communications on non-work time on technology provided by the employer. The revised Technology Use Policy is therefore unlawful.

VI. THE REVISED HANDBOOKS DO NOT CURE THE UNLAWFUL RULES IN THE PRIOR HANDBOOKS

The Board will find a violation cured only if the employer issues a repudiation of the unlawful conduct that is (1) timely, (2) unambiguous, (3) specific to the coercive conduct, (4) free from other proscribed illegal conduct, (5) adequately publicized to the employees involved, and (6) accompanied by assurances that the employer will not interfere with employees' Section 7 rights in the future. See *Passavant, supra,* 237 NLRB at 138; *In re Community Action Commission of Fayette County, Inc.*, 338 NLRB 664, 667 fn.12 (2002); see also *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, at *4 fn.3 (applying *Passavant* test to the purported repudiation of an unlawful handbook policy); *Danite Holdings, Ltd.*, 356 NLRB No. 124, 2011 WL 1585412, at *1 fn.1, *11 (Mar. 31, 2011) (same); *Claremont Resort & Spa*, 344 NLRB at 832 (same); *Boch Imports, Inc.*, 362 NLRB No. 83., 2015 WL 1956199 (April 30, 2015) (issuance of a new handbook without providing notice of unlawful conduct does not meet the requirements of *Passavant* to cure the previously disseminated unlawful rules).

The repudiation must admit the specific wrongdoing and assure employees that it will not occur again. See *Fresh & Easy Neighborhood Market*, *supra* (emphasizing that the purported repudiation "did not admit wrongdoing or assure employees that it would not further interfere with their Section 7 rights."); see also *Rivers Casino*, 356 NLRB No. 142, 2011 WL 1572359, at *3 (Apr. 26, 2011); *DirectTV U.S. DirecTV Holdings, LLC*, 359 NLRB No. 54, 2013 WL 314390, at *4-*5. The mere act of issuing a revised handbook policy, without more, does not negate the need for a notice posting to remedy the prior unlawful maintenance. See *Fresh & Easy Neighborhood Market*, *supra*; *Boch Imports, Inc., supra; DirectTV U.S. DirecTV Holdings, LLC*, *supra* (rejecting repudiation defense where employer posted a clarification of the

challenged policies); see also, e.g., *Dayton Power & Light Co.*, 267 NLRB 202, 202 (1983) (that respondent ultimately provided the requested information did not moot the alleged unlawful conduct).

Respondent's issuance in 2015 of the California Employee Handbook and the broader Employee Handbook is not sufficient to demonstrate Respondents' unambiguous repudiation of the unlawful provisions of its previous rules. The issuance of an entire handbook was anything but specific to the unlawful rules at issue, and certainly did not contain an admission as to the specific wrongdoing. In addition, Respondent never demonstrated any rules-specific repudiation whatsoever and the impact of the since-revised 2010 and 2011 rules potentially reached (and continues to reach) thousands of employees located throughout Respondent's 722 stores nationwide. In other words, there has been no adequately publicized repudiation.

Finally, the issuance of the 2015 Handbooks and was untimely inasmuch as it came four years after the promulgation of the California Handbook in May 2011 and five years after the promulgation of the broader Handbook in March 2010. See, e.g., *Fresh & Easy Neighborhood Market*, *supra* (judging timeliness with regard to the initial promulgation of the unlawful policies); *DirectTV U.S. DirecTV Holdings, LLC*, *supra* (same). Finally, there is no evidence that the since-revised handbooks provided specific assurances that Respondent would not otherwise interfere with employees' Section 7 rights. In short, there was no lawful repudiation under *Passavant*.

VII. A NATIONWIDE NOTICE POSTING REMEDY IS NECESSARY AND APPROPRIATE TO EFFECTUATE THE PURPOSES OF THE ACT

As made clear by the GC in its Consolidated Complaint (Jt. Exh. E at 7), the GC seeks a nationwide notice posting to remedy Respondents' maintenance of the unlawful rules. More

specifically, the GC requests that Respondent "post at its places of business nationwide any Notice to Employees that may issue in this proceeding." *Id.* Where an employer has maintained unlawful policies contained in a handbook distributed to its business locations nationwide, a nationwide posting remedy is appropriate. The Board has "consistently held that, where an employer's overbroad rule is maintained as a companywide policy, we will generally order the employer to post an appropriate notice at all of its facilities where the unlawful policy has been or is in effect." *Guardsmark, LLC*, 344 NLRB 809, 812 (2005). As the D.C. Circuit noted, "only a company-wide remedy extending as far as the company-wide violation can remedy the damage." *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 381 (D.C. Cir. 2007).[12]

Here, the 2010 California-specific and the broader 2011 edition of Respondent's employee handbooks (Jt. Exhs. H and I) applied to all of Respondent's employees nationwide. The revised 2015 versions of the California specific and broader handbooks (Jt Exhs. J and K) are still in circulation and apply to all of Respondent's employees nationwide. In light of the nationwide distribution of the handbooks containing a multitude of unlawful rules, an order requiring posting nationwide is appropriate and necessary to remedy Respondent's maintenance of the unlawful rules.

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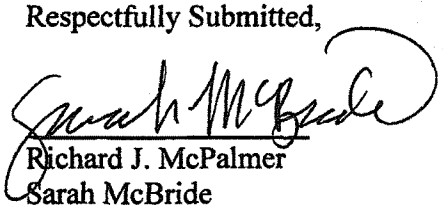
[12] See also, *First Transit, Inc.*, 360 NLRB No. 72 (2014) (ordering nationwide posting to remedy unlawful handbook rules and orally promulgated rules); *Longs Drug Stores California*, 347 NLRB 500, 501 (2006)(ordering posting at all facilities where unlawful policy is or has been in effect); *Fresh & Easy Neighborhood Market*, *supra* at *4 (ordering a nationwide posting to remedy unlawful rules violations); *DirectTV U.S. DirecTV Holdings, LLC*, *supra* at *6 (same); *Wal-Mart Stores, Inc.*, 352 NLRB 815, 849 fn.17 (2008) (two-member Board panel) (ALJ citing cases regarding the appropriateness of a nationwide posting remedy); *La Quinta Motor Inns, Inc.*, 293 NLRB 57, 57-58, 62 (1989).

VIII. CONCLUSSION

The record facts and applicable law amply demonstrate that the employee handbooks maintained by Respondent contained a multitude of rules that would reasonably be read by employees to restrict their Section 7 activities. The record is completely insufficient to establish that Respondent repudiated the unlawful rules in the 2010 and 2011 handbooks under *Passavant* by issuing the 2015 revised editions. For these reasons, and for those articulated above, the ALJ must order an adequate remedy to this violation, including the posting of a remedial notice at Respondent's facilities across the nation.

DATED AT San Francisco, California, this 22nd day of April, 2016.

Respectfully Submitted,



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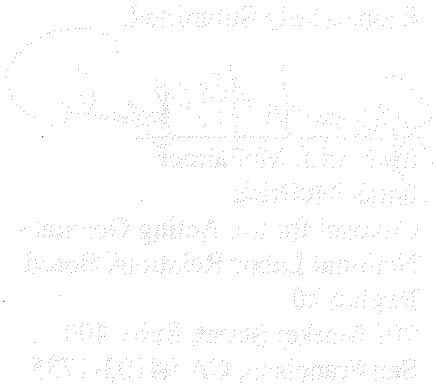

CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on December 30, 2016, I electronically filed the foregoing **PETITIONER, INTEVENING RESPONDENT AND INTERVENING PETITIONER COMMITTEE TO PRESERVE THE RELIGIOUS RIGHT TO ORGANIZE'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE** with the United States Court of Appeal for the Seventh Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on December 30, 2016.

/s/ *Karen Kempler*
Karen Kempler